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# IN THE
# COURT OF APPEALS OF INDIANA

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| STEVEN A. DERR, | ) | |
| | ) | |
| Appellant-Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 87A01-0612-CV-537 |
| | ) | |
| GENEVIEVE CRANE, Individually and as Personal Representative of the ESTATE of MYRTLE CRANE, | ) | |
| | ) | |
| Appellees-Defendants. | ) | |

APPEAL FROM THE WARRICK SUPERIOR COURT
The Honorable Robert R. Aylsworth, Judge
Cause No. 87D02-0405-PL-162

**August 17, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## Case Summary

Steven A. Derr ("Derr") appeals a judgment entered in favor of Genevieve Crane ("Genevieve"), individually and as personal representative of the estate of her mother, Myrtle Crane ("Myrtle"). Although he does not cite them by number, Derr challenges Findings #6 and #10. We affirm.

## Facts and Procedural History

The evidence most favorable to the trial court's judgment shows that in the "mid-, late eighties," Derr became interested in a sixty-acre property owned by Myrtle and her husband, William Crane. Appellee's App. at 1 (Derr's testimony). In approximately 1994, Derr and Myrtle began more serious discussions; Derr offered $80,000, and Myrtle countered with $100,000. *Id*. at 1-2. On March 4, 1995, Myrtle, then in her late eighties and "legally blind,"[1] executed a General Bill of Sale, which stated in relevant part:

> In consideration of five hundred dollars ($500.00), paid to me this day by Steve A. and or Linda C. Derr, as buyer, whose address is 312 S. 3rd St., Boonville, Indiana 47601, I, Myrtle Crane, whose address is R.R. 1, Lynnville, Indiana 47619, hereby grant, transfer, sell and deliver to buyer the following property: The option to right of purchase for the sum of one hundred thousand dollars ($100,000), the following described Real Estate: The South half of the Southwest quarter of Section Number Eleven (11), in Township 4 South and in Range 8 West, except Twenty acres off of the West end thereof, and said tract of land containing sixty (60) acres more or less. (Land with improvements.).

Appellant's Appendix at 60. The names of two witnesses appear at the bottom of the one-page General Bill of Sale: Steve Derr and S. Adam Derr, that is, Derr and his son. *Id*.; Tr. at 15.

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On May 19, 1995, Derr, Myrtle, and William[2] entered into an Option to Purchase Real Estate ("OTP"), which provided in relevant part:

> 1. [Derr, Myrtle, and William] agree [Derr] shall have the first option to purchase [the sixty-acre property as described in the General Bill of Sale] unless terminated in accordance with this agreement.
>
> 2. This option is granted in consideration of the payment of One Thousand Dollars ($1,000) on or before the date of execution of this agreement, and this option shall be continued in effect so long as [Derr] pays the additional sum of One Thousand Dollars ($1,000) on or before the same day and month of each successive year. Failure to make said payment, on a timely basis, shall result in the termination of this agreement and the loss of [Derr's] option.
>
> Notice of the exercise of the option shall be given by [Derr] in writing, to the Seller at the last address furnished by Seller to Purchaser. … Upon such exercise [of the option to purchase], the sale shall be made at the price and upon the terms set out in the succeeding provisions of this option. Such provisions shall, however, be of no force or effect unless the option is exercised. The purchase price for the real estate shall be the sum of One Hundred Thousand Dollars ($100,000), and shall be paid in cash at the time of closing.
>
> … .
>
> 4. [Myrtle and William] shall provide [Derr] with a good and sufficient warranty deed and an abstract of title or title insurance binder, in the name of [Myrtle and William]. [Myrtle and William] may, at their option, retain a life estate in the real estate for the remainders of their natural lives or until neither of them is living on the real estate, whichever comes first.
>
> 4A [handwritten]. *Seller Retains option of 3 acres in S.E. Corner of Property. S.A.D.* …
>
> 10. The terms and conditions of this agreement shall be separate and severable in the event any of such terms may be found to be invalid, illegal or unconstitutional.

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[1] Tr. at 136, 141-42. Testimony revealed that at that time Myrtle could read large type with a magnifying glass. *Id.* at 160, 18.

[2] William, who had suffered a stroke in 1987, apparently was not present for the signing of the OTP. Tr. at 16, 138, 143.

Appellant's App. at 56-59 (emphasis added). At the bottom of the OTP appear the signatures of Derr, Myrtle, and William by Genevieve as her father's attorney-in-fact. Derr handwrote paragraph 4A and his initials.

Derr made timely payments during the next several years until February 17, 2004. On that date, he sent to Myrtle and Genevieve[3] a Notice of Exercise of Option, in which he informed them of his decision to exercise his option to purchase the property pursuant to the OTP. *Id*. at 61. Neither Myrtle nor Genevieve began sale proceedings. On or about May 12, 2004, Derr filed a complaint against Myrtle for Declaration of Rights under the OTP and for specific performance. *Id*. at 13-15. Thereafter, Myrtle filed an answer and counterclaims, Derr amended his complaint, Genevieve was joined as a defendant, and Myrtle was deposed.

On November 19, 2004, Myrtle died testate. Appellee's App. at 13. Genevieve was appointed personal representative of Myrtle's estate. On November 30, 2004, Derr filed a reply to the counterclaims. The following month, the estate and personal representative were substituted for Myrtle. Mediation, although attempted, proved unsuccessful. Appellant's App. at 4. On August 22, 2005, Genevieve and the estate moved for summary judgment. *Id*. at 5 (CCS entry; no copy of motion appears in appendices). Apparently, Derr filed a response, a hearing was held regarding summary judgment, and an order was issued; however, copies of these documents have not been provided on appeal. *Id*. at 5-6.

The court held a bench trial on June 12-13, 2006, and then took the matter under advisement. *Id*. at 7. In a September 26, 2006 order, the court entered a judgment and issued findings, including the following:

1. That at the conclusion of Derr's case on June 12, 2006, the court granted Genevieve Crane's motion for judgment on the evidence, finding Derr's evidence insufficient to prove the claim of tortious interference with contract by Genevieve, as alleged in Count III. The court now confirms the granting of judgment on the evidence for Genevieve Crane as to Count III of Derr's complaint against her, finds that Derr shall take nothing against Genevieve Crane by virtue of Count III of his amended complaint. Judgment on the same shall be and is hereby rendered for Genevieve, and at Derr's costs as between these parties.

….

5. With the exception of affirmative defense 5, that there was no meeting of the minds concerning the provisions of the agreement upon which [Derr] seeks relief, the defendant estate has failed to prove by a preponderance of the evidence either the remaining seven affirmative defenses or the counterclaim counts the estate asserts against the plaintiff Derr in its November 8, 2004 answer and counterclaims to Derr's amended complaint. However, even with this finding, the court is not able under the facts and circumstances of this case to find for and enter judgment for the plaintiff Derr on his Count I prayer for declaratory judgment or his Count II prayer for an order of specific performance of the contract between the parties.

6. *The defendant Crane estate has proved by its evidence at trial that there was no meeting of the minds between these parties and that the contract between Crane and Derr is too indefinite to allow the court to enter an order of specific performance requiring the Crane estate to convey the subject real estate to the plaintiff Derr.*

….

10. *The inclusion of the handwritten paragraph "4.A." into the [OTP] is fatal to Derr's prayer for declaratory judgment or order of specific performance in his favor, as the court cannot complete what is an incomplete agreement between the parties, or otherwise speculate as to what may have happened or what the effect would have been, or could have been, upon the seller's exercise of the option to retain some 3 acres, and either as to location or effect on the purchase price otherwise to be paid by Derr to Crane for the remaining 57 acres.*

….

12. Because the court cannot under the facts and circumstance of this case order the estate to convey the subject real estate, or a portion of the subject real estate, to Derr, [Derr] is entitled to recover from the defendant estate the full amount of $9,000.00 received by Myrtle, or William and Myrtle, plus interest at the rate of 8% per annum accruing on each payment from the date such

[3] William passed away in February 1996. Appellee's App. at 13.

> payment was received by Crane from Derr. Further, the total amount due shall now accrue interest at the rate of 8% per annum until fully paid and satisfied. The total amount due and owing shall constitute a judgment for Derr and against the estate of Myrtle Crane but, pursuant to Trial Rule 54(D), costs shall be taxed to the plaintiff Derr, and not to the estate of Crane.

*Id.* at 8-12 (emphases added).

## Discussion and Decision

### *Standard of Review*

Where, as here, the trial court made special findings of fact and conclusions of law, our review is two-tiered:

> [W]e determine whether the evidence supports the trial court's findings, and we determine whether the findings support the judgment. We will not disturb the trial court's findings or judgment unless they are clearly erroneous. Findings of fact are clearly erroneous when the record lacks any reasonable inference from the evidence to support them, and the trial court's judgment is clearly erroneous if it is unsupported by the findings and the conclusions which rely upon those findings. In determining whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences to be drawn therefrom.

*Infinity Prods., Inc. v. Quandt*, 810 N.E.2d 1028, 1031 (Ind. 2004). Derr appeals from a negative judgment and therefore must

> demonstrate that the trial court's judgment is contrary to law. A judgment is contrary to law only if the evidence in the record, along with all reasonable inferences, is without conflict and leads unerringly to a conclusion opposite that reached by the trial court. In conducting our review, we cannot reweigh the evidence or judge the credibility of any witness, and must affirm the trial court's decision if the record contains any supporting evidence or inferences.

*Id*. at 1032.

Derr asserts that the court committed reversible error when it found that paragraph 4A was a fatal defect that rendered the OTP null and void. That is, he takes issue with Finding

#10. For support, he cites *Heritage Dev. of Ind., Inc. v. Opportunity Options, Inc.*, 773 N.E.2d 881, 890 (Ind. Ct. App. 2002) ("As a general rule, the failure of a distinct part of a contract does not void valid, severable provisions."), *trans. dismissed*, *Stoneburner v. Fletcher*, 408 N.E.2d 545, 549 (Ind. Ct. App. 1980), and paragraph 10 of the OTP. Appellant's Br. at 5. Derr contends that paragraph 10 of the OTP "shows that it was the intention of the parties that the terms and the conditions of the contract be separate and severable in the event any such part of the contract was found to be invalid." *Id*. at 5-6. He maintains that once the court found paragraph 4A invalid, it should have severed 4A from the OTP and granted Derr specific performance, i.e., forced the sale of the sixty acres. He stresses that the main purpose of the OTP was a purchase option for sixty acres. *Id.* at 6. In a related argument, Derr claims that the court committed reversible error by finding that the land description located in paragraph 4A was too indefinite to allow the court to enter an order of specific performance. That is, he questions Finding #6.

We agree with Derr's assertion that the parties' intent is paramount in contract cases – particularly those dealing with contracts for specific performance. However, as an examination of *Wenning v. Calhoun*, 811 N.E.2d 933, 935 (Ind. Ct. App. 2004), *reh'g granted on other grounds*, 827 N.E.2d 627 (Ind. Ct. App. 2005), *trans. denied*, reveals, this focus on discerning intent actually cuts against Derr's position. *See Wenning*, 827 N.E.2d at 629 ("In order to be enforceable, a contract must be reasonably definite and certain in its material terms so that the intention of the parties may be ascertained.").

In *Wenning*, a recent, strikingly similar case, we addressed the question of "whether a trial court may order specific performance of a land contract where the contract does not

specifically describe the land that is the subject of the contract." 811 N.E.2d at 934. The facts were as follows:

> Wenning owned acreage in Ripley County, Indiana. In 2001, he fell behind on his mortgage payments and needed to raise cash. In December, he entered into an oral agreement to sell three acres to Calhoun, the wife of his nephew, for $9,000.00, which she was to pay the following month from a settlement that she anticipated. Calhoun moved a mobile home onto the property, arranged to have utilities connected, and built a driveway.
>
> The following month, Calhoun learned that she would not be receiving the settlement, so she agreed to get financing for the purchase price from a bank. The parties therefore executed a written agreement (the "Contract") for the sale of the three acres on January 19, 2002. Like the parties' oral agreement, the Contract did not describe the land being conveyed. It stated:
>
> > To Whom it May Concern!
> >
> > I, Frank Wenning, am saleing[sic] 3 acres of 28 acres to Lottie Calhoun with opion[sic] to buy more if desired.
> >
> > I am saleing[sic] at $3,000 a[sic] acre for a total of $9,000.
> >
> > She has made a payment of $1,200.00 for Dec. 1, 01 to March 15th 2002 at $350.00 a month until[sic] paid in full or Settlement is received then will pay off in full.
> >
> > Lottie Calhoun has already had El, water, & phone services ran [sic] to 5910 W. Fairground Rd. Osgood, Ind. 47037 & Lottie & Dewain Calhoun are Living on the 3 acres at this time.
>
> Appellant's Appendix at 7.
>
> Calhoun was unable to obtain a loan for the purchase price, but she paid Wenning $500 in February 2002 and continued to make monthly payments of $350.
>
> In October 2002, Wenning filed a complaint asking the trial court to award him immediate possession of the land. Calhoun counterclaimed for specific performance. In December 2002, the trial court conducted a bench trial and thereafter entered its judgment ordering Wenning to specifically perform the Contract. Wenning now appeals.

*Id*. at 934-35.

In reversing and remanding, we noted the discretion afforded trial courts in such cases, but concluded:

> the only designation in the Contract of the land at issue is three acres of Wenning's twenty-eight acres, plus the street address of 5910 W. Fairground Rd. *There is simply no way for third parties to discern from this description precisely which three acres Wenning intended to convey. Accordingly, the contract is too indefinite to specifically enforce because it is impossible to determine how to enforce it.*

*Id.* at 935 (emphasis added).

*Wenning* reiterates that generally, if any essential elements are omitted or left obscure and undefined, *so as to leave the intention of the parties uncertain* respecting any substantial terms of the contract, the case is not one for specific performance. *See Johnson v. Sprague*, 614 N.E.2d 585, 588 (Ind. Ct. App. 1993). Moreover, a contract to convey real estate generally may not be enforced by specific performance unless the evidence is such that the court may determine with reasonable certainty what property the promisor agreed to convey. *Larabee v. Booth*, 463 N.E.2d 487, 491 (Ind. Ct. App. 1984). We applied this rule in *Wilson v. Wilson*, 134 Ind. App. 655, 660, 190 N.E.2d 667, 669 (1963), where we held that a written contract for the sale of real estate that described the land at issue as "137 acres" in a certain township in a particular county in Indiana was not specifically enforceable because the description was too indefinite.

By contrast, in *Larabee*, 463 N.E.2d at 491, another litigant argued that the court erred in ordering specific performance of the contract because the property to be conveyed was not described with sufficient certainty. There, the parties stipulated that, before the suit was filed, the grantor commissioned a surveyor to survey the land that she had given to the

grantees. We noted that this survey yielded a very precise metes and bounds description of the parcel, on which the trial court was entitled to base its order for specific performance. Therefore, we held that the boundaries of the property conveyed were established with sufficient certainty to justify the court's order of specific performance. *Id*.

Here, it appears that on the day the OTP was signed, Derr and Genevieve negotiated for her to have an option. Appellee's App. at 5-7. According to his testimony, Derr handwrote paragraph 4A, which states, "Seller Retains option of 3 acres in S.E. Corner of Property," and placed his initials next to the provision. *Id*. Derr claims that the three acres were for Genevieve "upon her retirement to be able to come back here and live to where she would have that two or three acres in that southeast corner up under the big oak tree" and that the plot was bordered by Tecumseh Road and "the east fence line." *Id.* at 3-6. However, according to Genevieve, the aforementioned oak tree was not on the sixty acres, but actually on a neighbor's property. *Id*. at 14. Further, nothing "more specific [was] discussed" among Myrtle, Genevieve, and Derr regarding which three acres paragraph 4A referred to – let alone what shape the three-acre plot was. *Id*. at 14. Moreover, Genevieve was not the seller, but merely her father's attorney-in-fact. Her parents, the sellers, were deceased by the time of trial, and no evidence was introduced regarding what William and Myrtle's understanding was as to which three acres in the southeast quadrant were referenced or what shape the plot was. *Id*. at 9. When pressed, Derr admitted that there was no other description or writing in existence anywhere that would tell which three acres were the subject of the disagreement. *Id.* at 8. As should be evident, attempting to determine the parties' intent is impossible at this late date.

There was evidence that the sixty-acre property is shaped in a rectangle, which, if divided into four equal sections, would consist of fifteen-acre quadrants. *Id.* at 7. However, it would be pure speculation to try to pinpoint which three of the fifteen acres in the southeast quadrant of the sixty-acre property were the ones at issue – let alone whether the plot was pie-shaped, rectangular, square or some irregular shape. As in *Wenning*, there is simply no way for third parties to discern from the OTP precisely the three acres noted in paragraph 4A. It follows then that it is impossible to establish the other fifty-seven acres. As such, the OTP is too indefinite to be specifically enforced. *See Wolvos v. Meyer*, 668 N.E.2d 671, 675 (Ind. 1996) (noting enforcement of incomplete or ambiguous writing creates substantial danger court will enforce something neither party intended); *see also Spinsky v. Kay*, 550 N.E.2d 349, 351 (Ind. Ct. App. 1990) (noting equity will not decree specific performance of a contract that is vague, indefinite, and uncertain), *trans. denied.* To sever paragraph 4A from the rest of the OTP would be to rewrite the contract, which we are not at liberty to do. *See Indiana-Kentucky Elec. Corp. v. Green*, 476 N.E.2d 141, 145 (Ind. Ct. App. 1985) (noting courts may not rewrite and then enforce contracts, which, to the knowledge of the court, the parties themselves did not enter into), *trans. denied*.

In sum, Derr has not shown that the record lacks any reasonable inference from the evidence to support the findings of fact. Stated otherwise, neither the findings nor the conclusions are clearly erroneous.[4]

Affirmed.

[4] We note that, unlike in *Wenning*, the court here already provided a remedy for Derr. 811 N.E.2d at 936. Specifically, the court required that Derr be repaid with interest.

FRIEDLANDER, J., concurs.

BAKER, C. J., dissents with separate opinion.

**IN THE**

# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| STEVEN A. DERR, | ) | |
| | ) | |
| Appellant-Plaintiff, | ) | |
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| vs. | ) | No. 87A01-0612-CV-537 |
| | ) | |
| GENEVIEVE CRANE, Individually and as Personal Representative of the ESTATE of MYRTLE CRANE, | ) | |
| | ) | |
| Appellees-Defendants. | ) | |

**BAKER, Chief Judge, dissenting.**

I respectfully dissent from the majority's conclusion that the trial court correctly determined that paragraph 4A of the OTP rendered the entire contract null and void. As the majority aptly observes, this court has previously determined that the failure of one part of a contract generally does not void valid, severable provisions. Heritage Dev. v. Opportunity Options, 773 N.E.2d 881, 890 (Ind. Ct. App. 2002). Instead, it is the intention of the parties that determines whether a contract is or is not divisible. Stoneburner v. Fletcher, 408 N.E.2d 545, 549 (Ind. Ct. App. 1980).

After examining paragraph 10 of the OTP, I must agree with Derr's contention that "it was the intention of the parties that the terms and the conditions of the contract be separate

and severable in the event any such part of the contract was found to be invalid." Appellant's Br. p. 4-5. In my view, it is apparent that the primary purpose of the OTP involved Derr's option to purchase sixty acres. On the other hand, the option the Cranes set forth in handwritten paragraph 4A was a provision that was not part of the main purpose of the contract. Indeed, it was the Cranes who requested the addition of paragraph 4A just before the parties executed the agreement. Hence, when the contract was signed, Derr received the option to purchase the sixty acres and the Cranes were granted an option to reserve three acres. Clearly, Derr could have received the sixty acres after asserting his right to purchase and making payment to the Cranes in the amount of $100,000 as set forth in the contract. Appellant's App. p. 56-59. As a result, the option afforded the Cranes under paragraph 4A was merely collateral to the main purpose of the contract and the primary purpose of the contract could have been fulfilled without any right being asserted under paragraph 4A.

Paragraph 10 of the OTP implies that the provision granting the Cranes <u>their</u> option was severable from the principal contract. Moreover, the option set forth in paragraph 4A might never have become an issue because it was the Cranes who had the right to exercise that option—and they never did. Therefore, I cannot agree with the majority's view that to sever paragraph 4A from the remainder of the OTP would result in an improper rewriting of the contract. Slip op. at 11.

Finally, I part ways with the majority's determination that it is "impossible to determine the parties' intent . . . at this late date" with regard to the land referenced in paragraph 4A. Slip op. at 11. Although the record suggests that the "big oak tree" was not

located on the Crane property, the area that the Cranes sought to reserve that was referenced in paragraph 4A was described as "3 acres in S.E. corner of property." Appellant's App. p. 57. In light of this language, I cannot agree that it was impossible to establish the remaining fifty-seven acres. Indeed, a description of real property in a right of first refusal can be found sufficient if otherwise lacking in an exact description. See Stoneburner, 408 N.E.2d at 550 (holding that a description of a "lot located immediately adjacent to the west of the within described real estate" was a sufficient description).

In my view, the evidence was sufficient to support a meeting of the minds with regard to the location and acreage of the property referred to in paragraph 4A, and the description was definite enough to allow Derr to enforce his option to purchase the property. In other words, this is not a case where essential elements of the contract were undefined to defeat Derr's claim for specific performance. Therefore, I would reverse the trial court's judgment.